

- (1) In the third paragraph where the parties are identified under the heading PROPOSED DECISION, on page 1 of the Proposed Decision, the word "Dennis" is substituted for the word "David."
- (2) The subheading "TLC America" is substituted for the subheading "TCL America" directly under the heading FACTUAL FINDINGS and before paragraph 1, on page 1 of the Proposed Decision.
- (3) In the ninth sentence of paragraph 2 of Factual Findings, on page 2 of the Proposed Decision, the word "a" is substituted for the word "at."
- (4) At the beginning of the thirteenth sentence of paragraph 2 of Factual Findings, on page 2 of the Proposed Decision, the repetitive words "the end of" are deleted.
- (5) In the first sentence of paragraph 8 of Factual Findings, on page 2 of the Proposed Decision, the word "TLC" is substituted for the word "TCL."
- (6) In the first sentence of paragraph 9 of Factual Findings, on page 2 of the Proposed Decision, the word "it" is substituted for the word "is."

- (7) In the first sentence of paragraph 10 of Factual Findings, on page 2 of the Proposed Decision, the word "TLC" is substituted for the word "TCL."
- (8) In paragraph 14 of Factual Findings, on page 3 of the Proposed Decision, the word "Dennis" is substituted for the word "David."
- (9) The subheading "Respondent Dennis Derr" is substituted for the subheading "Respondent David Derr" in between paragraphs 15 and 16 of Factual Findings, on page 3 of the Proposed Decision.
- (10) In the first sentence of paragraph 16 of Factual Findings, on page 3 of the Proposed Decision, the word "Dennis" is substituted for the word "David."
- (11) For the third sentence of paragraph 16 of Factual Findings, on page 3 of the Proposed Decision, "He is currently registered with California Financial Network, Inc. and Grant Bettingen, Inc." is substituted for the sentence "He is currently registered with three brokers – Transamerica Financial Advisors, California Financial Network, Inc. and Grant Bettingen, Inc."
- (12) In the first sentence of paragraph 17 of Factual Findings, on page 3 of the Proposed Decision, the word "TLC" is substituted for the word "TCL."
- (13) At the beginning of the second sentence of paragraph 19, on page 3 of the Proposed Decision, the words "TLC the" is substituted for the words "the TLC."
- (14) In the first sentence of paragraph 33 of Factual Findings, on page 5 of the Proposed Decision, the word "about" is substituted for the word "bout."

This Decision shall become effective on 10/8/03.

IT IS SO ORDERED 10/8/03.

DEMETRIOS A. BOUTRIS
California Corporations Commissioner

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of:

DENNIS DERR

Respondent.

Case No. alpha

OAH No. L 2003030369

DESIST AND REFRAIN ORDERS

PROPOSED DECISION

Administrative Law Judge N. Gregory Taylor, Office of Administrative Hearings, State of California, heard this matter in Van Nuys, California on June 2nd, 2003.

Daniel P. O'Donnell, Corporations Counsel, represented Complainant Virginia Jo Dunlap, Supervising Counsel, Enforcement and Legal Services Division of the Department of Corporations, State of California ("Department").

Respondent David Derr was present throughout the hearing and represented himself.

Following the completion of testimony the record was held open for the parties to file written closing arguments.

The matter was submitted on July 1st, 2003.

FACTUAL FINDINGS

TCL America

1. TLC America ("TLC") was a California Corporation. Its executive offices were located in Brea, California.

2. TLC advertised that it offered investments in properties that had tax liens or were on the verge of foreclosure. These were called "Opportunity Properties." A high rate of return was offered depositors - 14% or 12%. Investor's signed a "Real Estate Investment Agreement" with TLC. A minimum investment of \$20,000 was required to participate. Investor deposits were placed in an escrow account. An investor had no authority to remove

investment funds once placed in the escrow account, for the duration of the agreement. TLC had complete control of funds in the escrow account and their subsequent use. An investor was to be provided at warranty deed verifying a purchase of an interest in property with the investor's funds. In at least one instance, only a portion of a depositor's funds was used for an investment in a parcel of real estate for which a document entitled Warranty Deed was provided. No explanation was provided as to the use of the balance of the funds. The term of the agreement was 365 days. At the end of the end of that time the investor could roll over the investment and interest into other properties or in the alternative receive check for the principal and/or interest.

3. It was represented that all properties acquired were to be paid for in full with no liens. Investors were to be tenants in common with TLC. The professional team assembled by TLC also was to guarantee safety and performance.

4. Options for tax deferral and for 1031 exchanges were offered by TLC as part of this program.

5. TLC (including TLC Investments & Trade Company, TLC America, Inc. dba Brea Development Company, TLC Brokerage, Inc. dba TLC Marketing and TLC Development, Inc.) never filed under the California Corporate Securities Law for any form of qualification authorizing the offer and sale of securities, nor did it file an exemption filing or the filing of a Notice of Transaction under that law.

6. In August 1998, a Mr. Edward F. Cossey became President of TLC

7. At the time Cossey assumed that office, TLC had a negative capital position of \$7 million. It was not in a position to guarantee a rate of return on any investments.

7. TLC never generated any cash. During the period between August 1998 and October 2000, TLC lost \$33 million.

8. In order to cover obligations to current investors, TCL made payments to them out of other person's investments. This was a type of Ponzi scheme.

9. TLC falsely represented that it was engaged in the real estate business when in fact was using investor funds to: (a) pay other investors; (b) invest over \$20 million in a fraudulent 'prime bank' scheme; (c) buy for \$3.5 million racehorses and dogs; (d) make charitable contributions in the amount of \$1.55 million to the high school football team that Cossey's son played for, including \$1 million for repairs to the stadium; and (e) deposit funds by wire overseas.

10. On October 5th, 2000, the United States Securities and Exchange Commission ("SEC") obtained a restraining order against TCL and Cossey. The United States District Court, Central District of California, also put TLC into receivership, appointing Robb Evans as receiver.

11. Cossey and Gary Williams, Chief Financial Officer of TLC, pled guilty in federal criminal actions instituted against them and are serving prison time, based on their TLC activities.

12. Prior to being placed in receivership, TLC had 1800 investors and there were 2500 investments.

13. Only eleven of the investors had their deeds from TLC recorded and those were involved with 1031 tax exchanges. The Warranty Deeds given other TLC investors were not in recordable form. The notarizations on them were not properly done.

14. None of the deeds given to investors of Respondent David Derr were recorded.

15. During the time it was in business, only half of the money TLC received was invested in real estate. There will be a shortfall in the cash recovered by the Receiver to return to investors of one-half of the funds deposited. This will amount to approximately \$60 million.

Respondent David Derr

16. Respondent David Derr has been selling securities since 1989. He has always been with a broker dealer. He is currently registered with three brokers – Transamerica Financial Advisors, California Financial Network, Inc. and Grant Bettingen, Inc. He has never been licensed as a broker-dealer.

17. On December 24th, 2002, the Department issued Desist and Refrain Orders to Respondent Dennis Derr ordering him to desist and refrain from effecting any transaction in, or inducing or attempting to induce the purchase or sale of any security in TCL. On January 10th, 2003, Respondent requested a hearing on the issues raised in the desist and refrain orders.

18. Respondent admitted that he was not registered with anyone for the sale of TLC investments. He stated that the reason for this was that such investments, in his opinion, were not securities. He based that belief on a legal opinion he said that he was provided. (No copy of this opinion was offered, however.) Respondent now agrees that the TLC investments were securities after what he learned from the SEC and Department.

19. Before selling TLC investments, Respondent said he reviewed financial statements TLC provided. After TLC the financial problems became known, he showed them to an accountant who told him they were worthless. Respondent did not do any title search on TLC properties involved in transactions he handled. He stated that it was impossible to verify the existence of the real estate involved in TLC transactions because the properties were located in so many states. He indicated that he did study the tax lien laws of

Texas but TLC soon abandoned dealing in Texas tax lien property. He said he was unaware of any financial problems at TLC.

20. Respondent admitted showing prospective purchasers of TLC investments a brochure prepared by TLC entitled "Opportunity Properties – A Safe, Liquid, Fixed Rate Investment." In this document, an investor was promised a safe fixed rate investment with guaranteed high returns secured by a warranty deed on the property made out to the investor.

21. Respondent made sixteen sales of investments in TLC for a total amount of \$1,061,000.54. He received \$136,000.00 in commissions from these sales. He did not disclose his commission to any of his customers.

22. Respondent was sued by TLC's receiver to recover the commissions Respondent received on the sales of TLC investments. Respondent settled the matter by agreeing to return \$32,000.00.

23. Following the TLC receivership, Respondent sent letters to his clients who had invested in TLC, advising them of developments. In such a letter dated March 13th, 2001, he advised them to sign retainer agreements with Gibson, Dunn and Crutcher to represent them in seeking to recover their funds. He went on to make the following statement:

"Secondly, some of you received a letter and questionnaire from the State of California Department of Corporations. After careful review, unfortunately it seems that they will not help in retrieving your funds nor representing anyone. They only seem to be interested in asking many questions, some of which are already known. Someone must have contacted them about some issues and concerns. I see no benefit in taking your time and effort to fill out their form because they have already stated they would not help you with TLC America and court appointed receiver, Mr. Robb Evans."

Mrs. Sharon Doty

24. Respondent told Mrs. Sharon Doty about TLC. He told her it was a 100% risk free investment with a 14% guaranteed return secured by a promissory note and deed. He showed her the TLC brochure. The investment was to be for 365 days.

25. Mrs. Doty, in February 1999, invested \$20,000.00 in TLC on Respondent's recommendation. Mrs. Doty received an acknowledgement letter thanking her for her faith in Dennis Derr and TLC America.

26. In October 1999, Mrs. Doty was informed by TLC that \$18,000.00 of her investment had been invested in a parcel of property in Pukalani, Hawaii. No mention was made of the disposition of the \$2,000.00 balance in her account. She was promised a warranty deed on the property within 90 days.

27. On or about January 31st, 2000, Respondent received a Warranty Deed from TLC. It contained no legal description of the property only a street address and apartment number. It was not recorded.

28. In February 2000, Mrs. Doty received a \$2,800.00 check from TLC. This was the interest on her investment. Respondent asked her if she wanted to roll over the investment and interest received. Mrs. Doty decided to roll over the principal amount and keep the interest.

29. Respondent never disclosed to Mrs. Doty that he received a commission on the original investment and the roll over. Had she known this, it would have affected her decision to make the investment.

30. In making the investment and reinvestment with Respondent, Mrs. Doty was never told that less than half of the money invested in TLC was not reinvested in real property, that TLC had lost \$15 million between 1998 and 2000 or that TLC was paying investors out of funds invested by other investors. All of these facts were important to her and she would not have made the investment in TLC if she had known these facts.

31. Mrs. Doty then read about the SEC investigation in the newspaper. Following this she received a letter from Respondent denying that TLC was involved in a Ponzi scheme.

32. Mrs. Doty is 63 years of age. Because of her financial loss on the TLC investment and other investments, she has had to postpone retirement although she has health problems and should have done so.

Jeffrey Grage

33. Jeffrey Grage heard bout TLC from Respondent Dennis Derr. Respondent told him that it was a secure safe investment in real estate which was deed protected and had a guaranteed return. He also showed Grage the TLC brochure, noted that Grage would have his name recorded on a deed as a tenant in common with TLC and receive a guaranteed interest payment. Grage relied on these facts in making his decision to make an investment in TLC.

34. A minimum of \$20,000 was required to be able to make an investment in TLC. Grage told Respondent that he only had \$18,000 and inquired as to whether that precluded him from making such an investment. Respondent told him he would check with TLC. Respondent subsequently told Grage that TLC would accept an \$18,000 investment. According to Grage, this was all the money that Grage had.

35. In July/August 1999 Grage invested \$18,000 in TLC. He received one interest payment and rolled the investment and interest over once. TLC then went into receivership. Grage is hoping to receive 50% of his investment back from the receiver.

36. Grage was not told of the commissions Respondent received from the Grage investment in TLC. In addition, he was not told that TLC had invested no more than one half of moneys received in real estate, that TLC had never made a profit and had lost \$15 million between 1998 and 2000. He did not know that other investors' funds were being used to pay interest owing other investors or of the other improper expenditures of TLC described in Paragraph 30. Had Grage known these facts he would not have made the investment in TLC.

LEGAL CONCLUSIONS

1. The TLC "Real Estate Investment Agreement" signed by investors in that company is a security under the California Corporate Securities Law of 1968 [Corporations Code Section 2500 et seq.] Viewing the agreement as a note, it is a security because the investor relies on the skill, services, solvency, success of the issuer of the note, in this case TLC. *People v. Simon*, (1995) 9 Cal. 4th 493, 497, fn. 4. It is also a security because it meets the "risk capital test" in that the funds were being raised for a business venture or enterprise, the transaction was indiscriminately offered to the public at large, investors were substantially powerless to affect the success of the enterprise and the investors' money was substantially at risk because it was inadequately secured. *Moreland v. Dept. of Corporation* (1987) 194 Cal. App. 3d 506, 512. It is also a security under the "Howey" test in that it involves an investment of money into a common enterprise with an expectation of profit to come solely from the efforts of others. *S.E.C. v Howey* (1946) 328 U.S.293, 298-299. Indeed, Respondent concedes that the TLC "Real Estate Investment Agreement" was and is a security. The facts supporting this conclusion are more fully set forth in Paragraphs 1 through 15 and 24 through 36 of the Factual Findings.

2. Respondent violated Corporations Code Section 25210 by selling TLC securities in that he did so outside his affiliation with a broker dealer and in effect became his own broker dealer without such a license from the California Department of Corporations. The facts in support of this conclusion are set forth in Paragraphs 16 through 23 of the Factual Findings.

3. Respondent violated Corporations Code Section 25110 by selling TLC securities that had not been qualified, exempted or not subject to qualification pursuant to California law as is more fully set forth in Paragraphs 1 through 36 of the Factual Findings.

4. Respondent violated Corporations Code Section 25401 by his use of oral and written communications which included untrue statements that materially affected and influenced the decision of his client/investors in investing in TLC. Respondent is strictly liable for these statements irrespective of his actual knowledge although there appears to have been sufficient indications for him to have been put on notice (i.e. inadequate financial reports and failure to complete due diligence on TLC). *People v. Simon* (1995) 9 Cal. 4th 493, 516. The facts supporting this conclusion are set forth in Paragraphs 16 through 36.

5. Cause exists, pursuant to Corporations Code Section 25532, for the Corporations Commissioner to have issued orders to Respondent to desist and refrain from the offer or sale of TLC securities as is more fully set forth in Paragraphs 1 through 36.

ORDER

The Desist and Refrain Orders of the Commissioner of the Department of Corporations to Respondent Dennis Derr dated December 24th, 2002 are affirmed and upheld.

DATED: July 2, 2003.

N. GREGORY TAYLOR
Administrative Law Judge
Office of Administrative Hearings